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Effect of SA'S COVID-19 lock-down on transport services / operators and insurance

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In response to the global pandemic caused by the spread of the Covid-19 virus, President Ramaphosa has declared a national state of disaster. The word being used globally to describe this virus is unprecedented. In response to this, President Ramaphosa has been required to act and, by doing so, has himself taken steps previously unseen in South Africa's young democracy.

On 23 March 2020, President Ramaphosa informed the country that there would be a nationwide lock-down for a period of 21 days from midnight on 26 March 2020 until midnight on 16 April 2020, now extended to midnight 30 April 2020. In this address, President Ramaphosa advised that the majority of businesses providing goods and services would close during the lock-down. Only businesses and/or persons who provided an essential service would be permitted to operate during this time. The ideology was clear: to limit the amount of people in public areas so as to limit the spread of the virus.

While a vast majority of businesses have been placed on lock-down, this opinion will focus on the effects of the lock-down on the transport industry and potential claims flowing from the inability to perform services either in part or in full.

The effect of the lock-down on the transport industry

The Regulations to the Disaster Management Act 57 of 2002, as amended, relating to the lock-down (GG 43096 GNR 318) ("**the Regulations**") put in place strict protocols which transport operators would need to implement to continue their operations.

At the outset, it is recorded that freedom of movement is a constitutional right which is being limited by the government during the lock-down. In terms of section 36 of the Constitution, a right may be limited where it is reasonable to do so and within reasonable limits.

In making the decision to implement the lock-down, certain areas were identified as essential services which meant that employees of companies providing essential services would still be required to travel to their place of work. To enable the transporting of essential workers, certain provisions were put in place to allow minibus taxis, metered taxis and buses to transport these workers. However, rail services were suspended for both long-distance and local travel.

In respect of the limitations on transport operators, the first identified limitation provided that transport operators would only be permitted to transport essential workers to and from their places of employment. This means that they are permitted to operate between the hours of 5am and 9am each morning (since amended to 10am) and then again between 4pm and 8pm each afternoon. They are not permitted to operate between 10am and 4pm for any reason. This was clearly noted in an eNCA broadcast on 27 March 2020 where there were commuters (who were not within the essential workers category of people) waiting at a Cape Town taxi rank at around 10:30am, however, police presence ensured that no taxis or buses picked people up outside of their permitted operating hours. It is noted that between 30 March 2020 and 2 April 2020, transport operators are permitted to operate throughout the day to ensure that all SASSA grant beneficiaries receive their monthly stipend on time.

In addition to the limitation on operating hours, the Regulations also put into place strict measures relating to the number of passengers that a vehicle could carry and the sanitising protocols that needed to be upheld between trips. Conversations with regular taxi users confirmed that seats were wiped down between trips and commuters were asked to sanitise their hands.

Similar requirements were enforced on metered taxis and buses where the amount of passengers per trip were also limited to ensure that passengers could be conveyed with sufficient space between them to conform to the "social distancing" norm of 1 person per square metre.

The decision by the government to limit the types of transport operators and the operational times and procedures is a strong decision that many would deem adequate and necessary in the circumstances. While many commuters would argue to the contrary, the ideology remains clear: by imposing travel restrictions, less people would be out of their homes and it would be easier to limit the spread of the virus.

What remains unclear at this stage is what happens after the lock-down has ended. Often times, commuters who travel by bus or train buy weekly or monthly tickets for their preferred mode of transport as this works out cheaper over a longer period. However, if commuters have already purchased monthly tickets and are now unable to utilise it as a result of the lock-down, the question that arises is whether they are entitled to a refund or not.

The terms and conditions of weekly and monthly tickets would need to be carefully examined to consider whether the lock-down created an impossibility of performance of the transport operators. In the event that it did, the terms and conditions should stipulate whether a refund will be offered to the commuter or not. The alternative would be to consider whether the terms and conditions allow for the operation of a weekly or monthly ticket to be delayed and whether the transport operators would be able to monitor this properly.

Whether a refund becomes applicable or not, an issue arises either way. If refunds are required, it would open to floodgates for commuters to lodge claims against the transport operators for unfulfilled transportation. In this instance, two questions arise:

1. Will the government, as a result of imposing the lock-down, be prepared to subsidise transport operators for the lost income during the lock-down and/or the lost revenue caused by the refunds?
2. Will the transport operators be able to claim these amounts back from their insurance companies?

In response to the above questions, the transport operators are likely to be unsuccessful on both fronts. In relation to government assistance, we have seen that President Ramaphosa has implemented measures to supports SME's and traders in the informal sector during this time. However, at no stage were indications given on assistance or subsidies for large companies which transport operators would likely fall under. And, in respect of claims from insurance companies, global insurance experts have stated that most existing policies do not offer cover for epidemic or pandemic occurrences and insurance generally will not cover loss of income under pandemics. As such, a careful consideration of each insurance policy must be made to ascertain whether a transport operator will be covered or not.

On the flip-side, and in the event that refunds are not required to be paid out, commuters will suffer a loss. Most times, commuters using public transport do so as a result of their inability to afford private transport. While it may be easy for some people to write off the cost of a monthly ticket, these commuters bought that with money that could well have been used for other things that would have benefitted them greatly. As such, this loss will be greater than it may appear at face value.

In the event that refunds are not required, we must consider the following:

1. Do the terms and conditions of the tickets purchased allow for a delayed use of such tickets?
2. Do the transport operators have the infrastructure to facilitate and oversee the delayed use of previously purchased tickets? And
3. What would be the effect of not allowing for the delayed use of previously purchased tickets?

The response to the above questions are, again, one that needs to be made on a case by case basis.

We have already seen the economic effects of the lock-down of transport operators in that the taxi industry threatened that making half-capacity runs was not economically feasible and they would cease operations if things were not altered. Fikile Mbalula, the Minister of Transport has made adaptations to the original Regulations in that taxis would be allowed to run at 70% capacity IF all commuters wear masks.

Clearly the lock-down will affect all transport operators, however, only some of them are in a position to limit their loss of income at this stage. The rail services have been suspended completely and suffer a complete loss of income for as long as the lock-down continues. In addition, Minister Mbalula has made concessions to the taxi industry but has not indicated that these concessions will extend to the bus companies. While this, in its current form, constitutes unfair discrimination and an unfair competitive advantage in favour of the taxis, the decision does not fall within the ambit of the Competition Act 89 of 1998, as amended, because Minister Mbalula is not a participant in the transport market. As such, remedies available to the other transport operators are most likely limited to a complaint to Minister Mbalula or a request for a similar concession. In the event of these attempts failing, further consideration of possible remedies will likely need to be considered after the lock-down has ended.

While many would agree that the lock-down is necessary and essential in preserving as many lives in South Africa as possible, the end of the lock-down will raise many issues from loss of income and possible refunds by transport operators. Each case will need to be assessed individually as there is no one-size-fits-all solution given that policies are likely to be very different across the board.



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